

No. 13059

United States
Court of Appeals
For the Ninth Circuit.

CALIFORNIA ELECTRIC POWER COMPANY,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

OCT 22 1951

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

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DONALD J. CARMAN,
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For Appellee:

ERNEST A. TOLIN,
United States Attorney,
CLYDE C. DOWNING, and
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Bldg.,
Los Angeles 12, Calif.

United States District Court for the Southern
District of California, Central Division

Civil Action No. 12210-M

CALIFORNIA ELECTRIC POWER COM-
PANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

The above-named plaintiff in stating its cause of action against the defendant herein, complains and alleges:

I.

That this action arises under Section 1346(b), Title 28, United States Code.

II.

That plaintiff now is and at all times mentioned herein was a corporation organized and existing under and by virtue of the laws of the State of Delaware and duly authorized to do business as a public utility corporation in the State of California.

III.

That at all times mentioned herein plaintiff was the owner of that certain 88 KV electrical transmission line consisting of steel poles, crossarms, wire conductors, braces, attachments and appurtenances which extends from the City of Blythe,

County of Riverside, State of California, to the City of Calipatria, County of Imperial, State of California.

IV.

That on or about March 8, 1950, and at about the hour of 10:05 a.m. certain Navy pilots based at the U. S. Naval Auxiliary Air Station, El Centro, California, were engaged in air to air gunnery exercises over the Chocolate Mountain gunnery range; that said pilots were firing on a Drone target plane (TD2C-1, Navy, 120001) which was radio-controlled and operated by one of said [2*] pilots; that each of said pilots was employed by the United States of America and each was acting within the scope of his office or employment.

V.

That at said time and place defendant, acting through said employees, caused said Drone target plane to strike against and collide with plaintiff's said transmission line at a point approximately five miles east of Niland, California, and trespassed thereon; that as a direct and proximate result of said trespass plaintiff's steel poles Nos. 170, 171, 172 and 173 were caused to split and break, steel pole No. 168 was twisted and bent, and all three wire conductors were brought down; that the reasonable cost to plaintiff to repair the damage to said transmission line was and is the sum of seven thousand three hundred and forty-six dollars and four cents (\$7,346.04); that as a direct and proximate result of said trespass plaintiff was damaged

*Page numbering appearing at foot of page of original Certified Transcript of Record.

in the sum of seven thousand three hundred and forty-six dollars and four cents (\$7,346.04).

For a Second and Separate Cause of Action Plaintiff Alleges:

I.

That reference is made to the allegations contained in paragraphs I, II, III, and IV, of its First Cause of Action which are made a part hereof as fully as though set forth at length herein.

II.

That at said time and place defendant, acting through said employees, negligently and carelessly engaged in said air to air gunnery exercises; that as a direct and proximate result of said negligence and carelessness said Drone target plane was caused to strike against and collide with plaintiff's said transmission line at a point approximately five miles east of Niland, California; that as a direct and proximate result of said negligence and carelessness plaintiff's steel poles Nos. 170, 171, 172, and 173, were caused to split and break, steel pole No. 168 was twisted and bent, and all three conductors were brought down; that the reasonable cost to plaintiff to repair the damage to said transmission line was and is the sum of seven thousand three hundred and forty-six dollars and four cents (\$7,346.04); that as a direct and proximate [3] result of said negligence and carelessness, plaintiff was damaged in the sum of seven thousand three hundred and forty-six dollars and four cents (\$7,346.04).

Wherefore, Plaintiff prays judgment against defendant for seven thousand three hundred and forty-six dollars and four cents (\$7,346.04) and its costs herein, and for such other and further relief as the Court deems proper.

HENRY W. COIL,

H. M. HAMMACK,

DONALD J. CARMAN,

By /s/ DONALD J. CARMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed August 30, 1950. [4]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, United States of America, and in answer to the Complaint on file herein, admits, denies and alleges as follows:

I.

Admits that this action arises under Section 1346(b) Title 28, United States Code, commonly known as the Federal Tort Claims Act.

II.

Answering Paragraphs II and III of plaintiff's Complaint on file herein, this answering defendant has no knowledge or information sufficient to form a belief as to the truth or falsity of the averments

contained therein, and basing its denial upon said grounds, denies both generally and specifically, each and every allegation contained therein.

III.

Answering Paragraph IV of plaintiff's Complaint on file herein, defendant admits each and every allegation contained therein. [5]

IV.

Answering Paragraph V of plaintiff's Complaint on file herein, this answering defendant denies, both generally and specifically, each and every allegation contained therein, and further denies, both generally and specifically, that plaintiff was damaged in the sum of \$7,346.04 or in any other sum.

Answering Plaintiff's Alleged Second Cause of Action, Defendant, United States of America, Admits, Denies and Alleges as Follows:

I.

Answering Paragraph I of plaintiff's alleged Second Cause of Action, defendant re-adopts all and singular the allegations of its Answer to Paragraphs I, II, III and IV of plaintiff's alleged First Cause of Action which have been re-alleged and re-adopted by reference in Paragraph I of plaintiff's Second Cause of Action, and by such reference herein incorporates the admissions and denials with the same force and effect as if they were set forth herein and at length repeated.

II.

Answering Paragraph II of plaintiff's alleged Second Cause of Action, defendant denies, both generally and specifically, that any of its agents, servants and/or employees negligently and/or carelessly engaged in air gunnery exercises, and further denies that as a direct and proximate result of any negligence and/or carelessness on the part of said agents, servants and/or employees, a target plane was caused to strike against and collide with plaintiff's transmission line. Defendant further denies, both generally and specifically, that as a direct and proximate result of any negligence and/or carelessness on the part of agents, servants and/or employees of the defendant, plaintiff's steel poles were caused to split, break, twist and bend. Defendant further denies, both generally and specifically, that the cost to plaintiff to repair the damage allegedly caused by defendant or any of its agents, servants and/or employees was in the sum of \$7,346.04 or any other sum, and that plaintiff [6] was damaged in said sum or any other sum.

Wherefore, defendant prays judgment as follows:

1. That plaintiff's Complaint on file herein be dismissed.
2. That it have its costs of action incurred herein, and

3. For such other and further relief as the Court may deem just and proper in the premises.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

REUBEN ROSENSWEIG,
Assistant U. S. Attorney;

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney;
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed April 3, 1951 [7]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for trial on June 12, 1951, before the Court sitting without a jury, Henry W. Coil, H. M. Hammack and Donald J. Carman, by Donald J. Carman, appearing for plaintiff California Electric Power Company, a corporation, and Reuben Rosensweig, Assistant United States Attorney, acting on behalf of Ernest A. Tolin, United States Attorney, appearing for defendant United States of America, and evi-

dence both oral and documentary having been introduced and the cause submitted for decision and the Court have delivered oral opinion from the bench, the Court now makes its Findings of Fact as follows:

Findings of Fact

I.

That it is true that this action arises under and is brought pursuant to the provisions of Title 28, Section 1346(b) commonly referred to as the Federal Tort Claims Act.

II.

That it is true that plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is [9] duly authorized to do business in the State of California as a public utility corporation.

III.

That it is true that plaintiff was the owner of that certain 88 KV electric transmission line consisting of steel poles, cross-arms, wire conductors, braces, attachments and appurtenances which extend from the City of Blythe, County of Riverside, State of California to the City of Calipatria, County of Imperial, State of California.

IV.

That it is true that on March 8, 1950, at about the hour of 10:05 a.m., United States Navy pilots Lt. jg. Claude M. Stephenson, Lt. Burton E. Smith and John L. Culbert were engaged in air to air gunnery

exercises over the Chocolate Mountain Gunnery Range, and that said pilots were members of a squadron, some of which were firing on a drone target plane, which drone target plane was radio-controlled and operated and under the exclusive direction and control of said agents, servants and/or employees of the defendant United States of America. It is true that each of the pilots engaged in said air to air gunnery exercises were employed by the defendant United States of America, and each were acting within the scope and duty of their office or employment.

V.

That it is true that the said drone target plane collided with plaintiff's transmission line at a point approximately five miles east of Niland, California, but that it is untrue that defendant or any of its agents, servants and/or employees trespassed thereon. That it is further untrue that as a direct and proximate result of any trespass committed by defendant or any of its agents, servants and/or employees, plaintiff's steel poles and electric transmission lines were damaged, wrecked, twisted or broken..

VI.

That it is true that the reasonable costs to plaintiff to repair the damage to said transmission line and steel poles was the sum of \$7,330.75, but that it is untrue that as a direct and proximate result of any trespass on the part of the defendant or any of its agents, servants and/or employees, plaintiff [10] was damaged in said sum or any other sum.

dence both oral and documentary having been introduced and the cause submitted for decision and the Court have delivered oral opinion from the bench, the Court now makes its Findings of Fact as follows:

Findings of Fact

I.

That it is true that this action arises under and is brought pursuant to the provisions of Title 28, Section 1346(b) commonly referred to as the Federal Tort Claims Act.

II.

That it is true that plaintiff was and now is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is [9] duly authorized to do business in the State of California as a public utility corporation.

III.

That it is true that plaintiff was the owner of that certain 88 KV electric transmission line consisting of steel poles, cross-arms, wire conductors, braces, attachments and appurtenances which extend from the City of Blythe, County of Riverside, State of California to the City of Calipatria, County of Imperial, State of California.

IV.

That it is true that on March 8, 1950, at about the hour of 10:05 a.m., United States Navy pilots Lt. jg. Claude M. Stephenson, Lt. Burton E. Smith and John L. Culbert were engaged in air to air gunnery

exercises over the Chocolate Mountain Gunnery Range, and that said pilots were members of a squadron, some of which were firing on a drone target plane, which drone target plane was radio-controlled and operated and under the exclusive direction and control of said agents, servants and/or employees of the defendant United States of America. It is true that each of the pilots engaged in said air to air gunnery exercises were employed by the defendant United States of America, and each were acting within the scope and duty of their office or employment.

V.

That it is true that the said drone target plane collided with plaintiff's transmission line at a point approximately five miles east of Niland, California, but that it is untrue that defendant or any of its agents, servants and/or employees trespassed thereon. That it is further untrue that as a direct and proximate result of any trespass committed by defendant or any of its agents, servants and/or employees, plaintiff's steel poles and electric transmission lines were damaged, wrecked, twisted or broken..

VI.

That it is true that the reasonable costs to plaintiff to repair the damage to said transmission line and steel poles was the sum of \$7,330.75, but that it is untrue that as a direct and proximate result of any trespass on the part of the defendant or any of its agents, servants and/or employees, plaintiff [10] was damaged in said sum or any other sum.

Findings of Fact on Second Cause of Action

I.

Defendant herewith repeats, readopts and realleges each and every paragraph of the Findings of Fact to plaintiff's First Cause of Action, and by such reference incorporates in the same herein and makes the same a part hereof as though herein set forth in full as the Findings of Fact to Paragraph I of plaintiff's alleged Second Cause of Action.

II.

That it is untrue that on March 8, 1950, the defendant, acting through its agents, servants and/or employees, negligently and carelessly engaged in air to air gunnery exercises; that it is untrue that as a direct and proximate result of any negligence or carelessness on the part of defendant or any of its agents, servants and/or employees its drone target plane was caused to strike against and collide with plaintiff's transmission line and steel poles; that it is untrue that as a direct and proximate result of any negligence or carelessness on the part of defendant or any of its agents, servants and/or employees, plaintiff's transmission line and steel poles were damaged, wrecked, twisted or broken.

III.

That it is true that the reasonable cost to plaintiff to repair the damage to said transmission line and steel poles was in the sum of \$7,330.75, but that it is untrue that as a direct and proximate result of any negligence or carelessness on the part of defend-

ant or any of its agents, servants or employees plaintiff was damaged in said sum or any other sum.

Conclusions of Law

And, as Conclusions of Law, from the foregoing facts, the Court finds:

I.

That this Honorable Court has jurisdiction to hear and determine the within matter. [11]

II.

That the doctrine of *res ipsa loquitur* applies in this case, but that the defendant has overcome any presumption or inference of carelessness or negligence created by said doctrine.

III.

That plaintiff take nothing by its Complaint on file herein.

Judgment is hereby ordered to be entered accordingly without any costs.

Dated: June 28th, 1951.

/s/ PAUL J. McCORMICK,
United States District Judge.

Approved as to form and substance:

COIL, HAMMACK and
CARMAN,

By
Attorneys for Plaintiff.

ERNEST A. TOLIN,
United States Attorney;

CLYDE C. DOWNING, and

REUBEN ROSENSWEIG,
Assistant U. S. Attorneys;

By /s/ REUBEN ROSENSWEIG,
Attorneys for Defendant.

[Endorsed]: Filed June 28, 1951. [12]

In the United States District Court in and for the
Southern District of California, Central Division

No. 12210-M Civil

CALIFORNIA ELECTRIC POWER COMPANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 12th day of June, 1951, before the Court sitting without a jury, Henry W. Coil, H. M. Hammack and Donald J. Carman, by Donald J. Carman, appearing for plaintiff, and Reuben Rosensweig, Assistant United States Attorney, acting on behalf of Ernest A. Tolin, United States Attorney, appearing

for defendant United States of America, and evidence both oral and documentary having been introduced, and the cause submitted for decision, and the Court having heretofore made and caused to be filed herein its written Findings of Fact and Conclusions of Law, and being fully advised in the premises;

Wherefore, by reason of the law the oral opinion and the Findings of Fact as aforesaid, it is Ordered, Adjudged and Decreed that defendant have judgment herein without costs.

Done in open Court this 28th day of June, 1951.

/s/ PAUL J. McCORMICK,
United States District Judge.

Presented by:

/s/ REUBEN ROSENSWEIG,
Assistant U. S. Attorney.

Approved as to form:

COIL, HAMMACK and
CARMAN,

By /s/ DONALD J. CARMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed June 28, 1951. [14]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that California Electric Power Company, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 28, 1951.

HENRY W. COIL,

H. M. HAMMACK,

DONALD J. CARMAN,

By /s/ DONALD J. CARMAN,

Attorneys for Appellant.

[Endorsed]: Filed July 18, 1951. [15]

United States District Court for the Southern
District of California, Central Division

No. 12210-CM

CALIFORNIA ELECTRIC POWER COM-
PANY, a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

REPORTER'S TRANSCRIPT ON APPEAL

June 12, 1951

Before: Hon. Paul J. McCormick, Chief Judge.

Appearances:

For the Plaintiff:

HENRY W. COIL,
H. M. HAMMACK, and
DONALD J. CARMAN, By
DONALD J. CARMAN.

For the United States of America:

ERNEST A. TOLIN,
U. S. Attorney; By
REUBEN ROSENSWEIG,
Assistant U. S. Attorney.

June 12, 1951

The Court: Call the case, Mr. Clerk.

* * *

Mr. Rosensweig: The Government is ready, your Honor.

Mr. Carman: Plaintiff is ready, your Honor.

The Court: Proceed, gentlemen.

Mr. Carman: May it please the Court, this is an action arising under the Federal Tort Claims Act. It developed at 10:05 in the morning of March 8, 1950. A radio-controlled Navy target plane crashed into the California Electric Power Company's 88 KV electric pole transmission line which extends from Blythe, California, to Calipatria, California. The accident occurred at a point 20 miles northeast of Calipatria and about 45 miles southwest of Blythe. As a result of the crash four of California Electric Power Company's steel poles were broken, one was bent, and all three wire conductors were brought down. Immediately prior to the accident certain Navy pilots were engaged in air-to-air gunnery exercises over the Chocolate Mountain Gunnery Range, and were firing upon the target plane. I understand that the power line rights are within the confines of the Chocolate Mountains although I don't know the exact boundaries of that range.

The Court: I wonder if we can have some stipulation on that phase of it?

Mr. Rosensweig: We have such a stipulation

which we intend to read into the record after counsel has finished [2*] with his opening statement.

The Court: Very well, proceed, Mr. Carman.

Mr. Carman: This target plane was operated by and its flight was directed by Navy pilots that were engaged in the exercise. Plaintiff's complaint alleges the pilots were employed by the Government, were acting within the scope of their employment, and in two counts alleges that allegedly they caused the plane to crash into the power lines and alternately, that they caused it to trespass upon plaintiff's power lines.

The Court: On this question of trespass, we have had occasion to examine that some years ago in connection with the installation of the Lockheed Air Terminal. How are you going to prove that question of trespass?

Mr. Carman: Well, your Honor, we, of course, will rely on the doctrine of liability with fault, under the theory that the defendant here was engaged in ultra hazardous activities.

The Court: I suppose all these war activities are extra hazardous, aren't they?

Mr. Carman: Particularly when they take aloft a controlled plane and fire upon it, it seems they are engaged in an extra hazardous activity.

The Court: This was a drone plane. In that Lockheed case, it went to the Supreme Court, and I think the matter of [3] trespass was ruled out of the phase pretty well. There was a dairy farm and there were a lot of milk cows, and these transports

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

were coming in and out, and the aviation soon frightened these cows and caused a tremendous loss to the dairies out there. That was also a great hazard to the dairy workers and they sought to recover on the theory of trespass.

Mr. Carman: That was, I suppose, an operation by conventional-type aircraft in that the pilot guided it, and probably is a little different situation.

The Court: That is true. It may be.

Mr. Carman: The defendant's Answer admits the pilots were employed by the defendant and were acting within the scope of their employment, admits that they were engaged in aerial gunnery exercise at about 10:05 in the morning of March 8th, over the Chocolate Mountain Gunnery Range, that they were firing upon the target plane, and that the target plane was controlled and operated by the Navy pilot. The Answer denies all of the allegations of the Complaint. Mr Rosensweig and I have talked over certain stipulations we would like to make now, in order to simplify the issues, if we may. I will read the stipulation:

It is hereby stipulated by the above-named defendant by and through its counsel, as follows: first, that the California Electric Power Company is a corporation organized and existing under the laws of the State of Delaware, [4] and duly authorized to do business as a public utility company in the state of California.

Mr. Rosensweig: So stipulated, your Honor.

Mr. Carman: Second, March 8, 1950, California Electric Power Company was the owner and posses-

sor of that certain 88 KV electric transmission line extended from Calipatria, California, to Blythe, California.

Mr. Rosensweig: So stipulated.

Mr. Carman: Third, that at about 10:05 a.m., March 8, 1950, a Navy drone target plane, TD2C-1, Navy, 120001 crashed into said transmission line.

Mr. Rosensweig: So stipulated, your Honor.

Mr. Carman: Fourth, that as a result of said crash steel poles No. 170, 171, 172, and 173 were caused to split and break; steel pole No. 168 was twisted and bent, and all three conductors were brought down.

Mr. Rosensweig: So stipulated, your Honor, and I think it can be said we likewise stipulate to the fact that steel poles 170, 171, and 172, and 173 and 168 are located within the area generally referred to as the Chocolate Mountain Gunnery Range.

Mr. Carman: So stipulated.

The Court: Is there any stipulation or is there any agreement, assuming that there is liability as to the damage?

Mr. Carman: As to the amount of damages, your Honor? [5]

The Court: Yes.

Mr. Rosensweig: I am sorry, your Honor, I would be unable to stipulate to those particular things.

The Court: Are you going to raise an issue there?

Mr. Rosensweig: As to the amount of damages?

The Court: Yes.

Mr. Rosensweig: We would raise the issue for this particular reason: in discussion with counsel concerning the amount of damages we discussed many phases of damages that were caused because of the loss of circuits to subscribers to the electric power of the California Electric Power Company. We think that those damages are somewhat in the field of speculation.

Mr. Carman: Plaintiff is not making any claim for those damages.

The Court: Those would be consequential, wouldn't they?

Mr. Rosensweig: I think they would.

The Court: Probably you think so.

Mr. Carman: Certainly. We are claiming no damages for interruption of service at all, your Honor. We are simply claiming damages for the repair of the damage done to our power line.

Mr. Rosensweig: I think there will be no opposition to the testimony. I don't think the testimony of the individual who has knowledge of the amount of damage would be objectionable, [6] testimony as to his estimate; but I am unable, your Honor, to stipulate to the amount.

The Court: What I want to know is the length of the trial. That is why I am asking these questions. If you are going to introduce a lot of experts as against their experts it is going to take some time to develop that.

Mr. Rosensweig: No, your Honor, we don't expect to introduce expert testimony as to the amount of damage. I think individuals working for and

employed by the electric power company are in the best position to know of the damages here. We do not propose to offer any evidence in opposition to that testimony.

The Court: I see. Very well, gentlemen. I think I understand the issues now.

Mr. Carman: Your Honor, as I see the case now, the only issue involved is the amount of damage and, of course, the legal liability for the damage. I don't know if it is proper, but I would like to proceed to put on testimony as to the amount of damage and then, maybe, have a short argument on the law as to the legal liability of the damages.

Mr. Rosensweig: No objection.

The Court: Very well.

Mr. Carman: May I call Mr. Sheppeard, [7] please.

EDGAR L. SHEPPEARD

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Carman:

Q. What is your position with California Electric Power Company?

A. I am assistant auditor.

Q. How long have you been employed by the company?

A. I have been employed by the company about 23 years.

Q. Do your duties as assistant auditor include

(Testimony of Edgar L. Sheppeard.)

among other things supervision over the preparation of statements of charges in those cases where third parties enter the company's property?

A. They do.

Q. Was the statement of charges originally submitted to the defendant in this case prepared under your supervision and control? A. It was.

Q. Is the amount of that bill correct?

A. Yes, sir.

Q. Mr. Sheppeard, I am asking you about the original bill that was submitted to the defendant.

A. There has been a slight change upon the original [8] bill.

Q. In other words, there was an error in that original bill? A. Yes, sir.

Q. In what respect was that bill in error?

A. The bill was in error in some charges for the equipment expense. The information originally received in our office was later proved to be in error when the final forms were submitted from the field.

Q. How large was that error?

A. Well, it's very minor, amounted to about \$15.29.

Q. Do you have a revised bill with you?

A. I do.

Q. Was it prepared under your general supervision and control? A. Yes, sir.

Q. Did you personally check the revised bill?

A. I have.

Q. Is the amount thereof correct and reasonable? A. I think so.

(Testimony of Edgar L. Sheppeard.)

Q. Do you have with you the original timecards, material requisition slips, mileage slips and other records from which the revised bill was prepared?

A. Yes, sir.

Q. I wonder if I could have those, Mr. Sheppeard. [9]

A. I have them all there together.

Mr. Carman: Your Honor, I would like to offer the revised bill and supporting documents in evidence, and I have a copy of the same here and request I be allowed to withdraw the originals.

The Court: So received and so understood; Plaintiff's Exhibit 1.

Mr. Carman: Do you have any questions on those, Mr. Rosensweig?

Cross-Examination

By Mr. Rosensweig:

Q. Mr. Sheppeard, the original amount of money prayed for in the plaintiff's Complaint was \$7346.04, and this figure of \$7330.75 is the revised figure, is it not? A. Yes, sir.

Q. That appears upon plaintiff's exhibit just offered? A. Yes, sir.

Q. That figure was arrived at through computations and mathematical computations made under your own direction and control? A. Yes, sir.

Mr. Rosensweig: I have no further questions.

The Court: Mr. Sheppeard, the material as distinguished from the labor, that was based on a replacement value, was it? [10]

(Testimony of Edgar L. Sheppeard.)

The Witness: That was based upon our current cost.

The Court: Current cost?

The Witness: Yes, sir.

The Court: I notice the item here says "Cost of removal and replacement of property damage."

The Witness: Yes, sir, that is merely a term of removing the damaged portions of the sector and putting in the new portions of the sector.

The Court: But the aggregate amount stated here, \$7330.75, with respect to the material, the physical material, was based upon a cost value?

The Witness: The present day cost, yes, sir; that is the cost of new material placed into the—used to repair the line.

The Court: This exhibit appears to be dated May 1, 1951.

The Witness: Yes, sir.

The Court: Was there any variance between the cost of the materials at the time of the destruction of them and May 1, 1951?

The Witness: Well, very little; there might have been some slight change.

The Court: How about the labor?

The Witness: There was no change in the cost of our labor at that time. Some of this work, however, was done by the Imperial Irrigation District. We do not know whether [11] there was any change in the cost of their labor during that period.

The Court: I see you have it listed as one of the items of miscellaneous expense.

(Testimony of Edgar L. Sheppeard.)

The Witness: Yes.

The Court: That item "Supervision and General Overhead, \$891.03," what goes into that item to make it up?

The Witness: That is the general supervision of the construction department and of the general supervision of the company. All of our costs I feel have to stand a portion of our general supervision expense.

The Court: That is really laborer's services?

The Witness: Yes.

The Court: I mean as distinguished from physical materials.

The Witness: That is correct.

The Court: That is all.

(Witness excused.)

Mr. Carman: Plaintiff rests, your Honor.

Mr. Rosensweig: Under the circumstances, your Honor, the Government will move to dismiss plaintiff's Complaint in the action on the grounds that they have failed to establish any negligence on the part of any agent, servant, and/or employee acting within the scope of his employment, as required under the provisions of the Tort Claims Act, [12] which specifically states that the Government shall be liable for the negligent acts of its agents acting only within the scope and duty of their employment. There has been no evidence introduced here as to how the accident occurred, what the cause of the accident was, whether there was any negligence on

the part of Government agents and/or its employees. There has been no evidence as to whether or not there has been any trespass, or any allegations or any evidence to support any of the allegations made in the plaintiff's Complaint. As counsel stated in his opening statement he has plead negligence in general terms, in one cause of action, by stating that this damage was caused as a direct and proximate result of the negligence of the agents, servants, and/or employees of the Government. In the second cause of action he alleges the same damage, of course, but for trespass.

I submit, your Honor, that having failed to introduce any evidence as to the facts concerning the happening of the accident the Court could only by inference indicate that because this accident did happen there was negligence on the part of the defendant, and I believe as a result of it plaintiff is seeking to establish the rule of *res ipsa loquitur*. I submit, your Honor, *res ipsa loquitur* does not apply in a case involving an airplane that is not in the business of passenger transportation, or commercial airlines, or airlines of some nature or description, in the transportation [13] business. The ultra hazardous activities which counsel had referred to in his opening statement I am sure would be borne out—there are not many cases on the subject, that is, I know of no case involving a situation such as this where the doctrine has been sought to apply or has been applied. In cases where the doctrine of *res ipsa loquitur* has applied it has involved the crashing of airplanes which are in business of

passenger transportation. I do not believe there is any case in the country which applies that particular rule in cases where the airplanes are not involved in the business of passenger transportation.

Under the present state of the case, your Honor, I think the best that can be said about it is this: that the Government was involved in air gunnery exercises, it does not deny it carried on air gunnery practice at the time in question; it does not deny that the men involved in the gunnery practice were agents, servants, and/or employees of the Government; it does not deny that the drone plane did crash into the power line. It does deny any negligence on the part of any of its agents, servants and/or employees caused that plane to crash into the power line or to crash into the Chocolate Mountain Gunnery Range. The best that can be said of the case at the present moment is that damage had been inflicted by an instrumentality of the defendant, but under the state of the case at the present time it can [14] only be said to be unintentional injury. There is no showing of negligence in the state of the plaintiff's present case, and it certainly cannot be said that if there is intentional injury inflicted upon a particular given party, the California Electric Power Company, or any other party, can it be said the plaintiff would be entitled to recover under the Federal Tort Claims Act, because that Act, your Honor, as you know, is a broad waiver of Government immunity from suit. That is, the general rule they have furthered from time immemorial is that the sovereign is free from liability. When the Act

was passed it surrendered sovereign immunity, and the Tort Claims Act, as already said, is a broad surrender of the sovereignability. But the Tort Claims Act says the Government shall be liable only where its agents, servants and/or employees are guilty of negligence, and if we assume for a moment that this was an accident that occurred, and undoubtedly a very unfortunate accident occurred, and possibly it can be said it was fortunate in this respect, that it did not happen in a populated area, or anything of that sort, but, nevertheless, it is an unfortunate situation that this damage was inflicted by an instrumentality of the Government. But because the accident did happen is no indication, nor is there any sign of any nature or description in the state of the case at the present time, that the Government or any of its agents, servants and/or employees [15] had been negligent. I do not believe the Court under the circumstances can infer, just because of the happening of that particular accident, and even if this was and can be placed in the category of being an ultra hazardous activity, which I doubt under the cases, that the Government could be liable under the Tort Claims Act, because there has been no showing whatever of negligence of any nature or description, and because of those reasons, your Honor, and I could go on for some period of time discussing the technical aspects of the case, and I might refer your Honor to the case of——

The Court: We had no pre-trial in this case at all, did we?

Mr. Carman: That is right, sir.

Mr. Rosensweig: There presently is, your Honor, a case entitled P. A. Kessinger and others, or it would be: United States of America, appellant, against P. A. Kessinger, being a case in the United States Court of Appeals, Tenth Circuit, 4229, in which briefs have already been filed by both the appellant and the appellee, which is a case almost directly on all four, so far as this particular case is concerned. There, likewise, a drone plane was involved, and there, likewise, the original cause was based upon the theory of trespass and, likewise, upon the theory of negligence, and I understand from information I have received from the Attorney General that case has already been argued before the [16] Tenth Circuit and it sets forth very fully and very amply the arguments that I have been making here, your Honor, that neither does the rule of *res ipsa loquitur* apply in cases of this character, nor does the theory of trespass apply, or any of the other matters of law that can be applied here in a case of this sort. When the Court of Appeals might render a decision in the case I am unable to say, your Honor. I imagine they are as up on their cases as our Ninth Circuit is, and it should not be too long before a decision is rendered in the case, although I will say this, in the case involved in the Tenth Circuit, it occurred in Kansas, and I believe the law of Kansas and the law of California is very similar, and so far as the case being won in this district, it certainly would apply on the basic rules established in that case, would definitely

apply. For those reasons, your Honor, I move the plaintiff's Complaint be dismissed.

The Court: Before ruling I just wanted to inquire, Mr. Carman, whether you had overlooked the fact that you haven't introduced either the interrogatories or the response to the interrogatories? Did you do that intentionally or did you overlook it?

Mr. Carman: No, your Honor, those were filed with the Court and I thought the stipulation we presented took care of the matter presented in those interrogatories.

Mr. Rosensweig: Yes, the stipulation entered into, [17] your Honor, would indicate very definitely the various things gone into in the interrogatories.

The Court: And you both agree that is the situation?

Mr. Rosensweig: Yes, your Honor.

The Court: I think on the motion to dismiss without prejudice—the Court is not inclined to indicate with precision its ideas on this because it is novel; it presents, like everything else these days, a new situation. There is a good deal to be said, however, upon the fact that while these preparatory activities to an act of potential warfare are extra hazardous, this Tort Claims Act, in my opinion, leaves in these old doctrines concerning negligence, the doctrine of *res ipsa loquitur*, the doctrine of shifting the burden in a case, the doctrine of presumptive evidence, that an accident which occurs out of the realm of normalcy calls upon the Tort

feasor to act for the—to overbalance the inference that arises because of an accident. Of course, this war situation brings in many new aspects, the training of men for military purposes and, particularly at this time, when there is an emergency which has developed into a shooting war, although, perhaps not classified in that way by some people, it brings in new theories which must be explored judicially, in order that the Tort Claims Act can be properly interpreted.

I think at this time the Court is clearly of [18] the mind that the case should go forward and at least that there is sufficient showing to permit the interpretation of the doctrine of *res ipsa loquitur*.

Mr. Rosensweig: If I may make one more short point, your Honor?

The Court: Yes.

Mr. Rosensweig: We spoke of the doctrine of ultra hazardous activities. That is a rather broad statement. I think that the ultra hazardous activity theory is generally referred to as liability-without-fault theory. Certainly it can be said that if this accident was one that occurred without fault or without negligence it would fall within that category of liability-without-fault, and if it can be said that this is an accident that occurred without the fault of any agent, servant and/or employee of the Government——

The Court: You mean an inevitable accident?

Mr. Rosensweig: Well, so far as we are individually concerned, yes, your Honor. It is one of

those things that happened without the fault of any agent, servant and/or employee of the Government.

The Court: Of course it happened.

I think the reasoning upon which a ruling at this time can be predicated is this: The instrumentalities must be presumed to be functioning normally, the transmission lines, that the structure itself was placed in position under [19] normal engineering and scientific processes, that it was in terrain which was remote, not populous, and that it was licensed by the appropriate political authorities to be placed there. There is no evidence, of course, as to how long it was there, but it was there at the time of the accident. Ordinarily, unless there was some obstacle that contacted with those instrumentalities there would not have been any outside force applied. There might have been some internal force because of aeronautics, or some disturbance of the scientific part of the apparatus, but there would have been no outside, exterior force, unless it be lightning and there is no evidence there was lightning; the property was destroyed.

The Tort Claims Act says that the same rule applies to the Government, now, as applies to the individual, that if there be negligence——

Mr. Rosensweig: Within a clear set of circumstances, your Honor.

The Court: Yes.

Mr. Rosensweig: That there must be some negligence on the part of some agent, servant and/or employee of the Government within the scope of its duty or employment.

The Court: There isn't any evidence of negligence on the part of any agent, servant and/or employee of the Government per se, because those are excluded by the Tort Claims Act. [20]

Mr. Rosensweig: That is correct.

The Court: The performance of a duty of a sailor or airman——

Mr. Rosensweig: There are some 12 specified exceptions, your Honor.

The Court: Yes; none of those are involved here, but there was a destruction of this property, from the interrogatories in the stipulation it now appears that there was a drone airplane there at which target practice was being directed. From those, what is the reasonable inference? There are two inferences, perhaps. One is the one that you argue, that there has not been any proof of negligence. The other is that because of the instrumentality itself when operated normally and according to a proved scientific and mechanical principle, it wouldn't have caused this difficulty.

Well, I think I shall adopt the inference at this time, subject to review later if the evidence warrants, that the theory of *res ipsa loquitur* is applicable, and the motion will be denied accordingly, without prejudice.

Mr. Rosensweig: Thank you.

(A short recess was taken.)

The Court: Proceed, gentlemen.

Defense

Mr. Rosensweig: Officer Culbert, will you take the [21] stand, please.

JOHN L. CULBERT

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please.

The Witness: John L. Culbert.

Direct Examination

By Mr. Rosensweig:

Q. Mr. Culbert, will you keep your voice up so we can all hear you?

What is your present rank?

A. My present rank is AD, first class, AP.

Q. In simple, ordinary language, what does that mean?

A. The AD is Aviation Device, which consists of being an aviation mechanic, and the first class is self-explanatory; the AP is for Aviation Pilot, being an enlisted pilot status.

Q. You are a pilot. A. Yes, sir.

Q. How long have you been a pilot?

A. I received my wings in March, 1947.

Q. You have been flying airplanes of what type during the period from 1947 to the present time?

A. Well, the first year I flew patrol bombers

(Testimony of John L. Culbert.)

PBM type, and then went to the utility shops, the radio control, [22] and have been in there ever since.

Q. How much experience, Mr. Culbert, have you had with the operation and control of drone planes?

A. Well, approximately three years' experience with it. There are certain qualifications for this, and I am considered fully qualified for this radio control work. They have different phases of radio control.

Q. Were you at one time during your service in the Navy, Mr. Culbert, stationed at the Chocolate Mountain Gunnery Range?

A. Only through temporary, additional duty from the Marine Corps Air Station, El Toro.

Q. When you had your additional duty at the Chocolate Mountain Gunnery Range, what were those duties?

A. They varied from day to day on the different control stations for this radio control.

Q. Calling your attention, Mr. Culbert, to the date of March 8, 1950, were you stationed at that time—where were you stationed at that time?

A. Well, I understand this date is the date in question here. On that date my duties were what is called Charlie Two position, which is a secondary control plane, and it is a fighter type plane which is standing by to take control in case the Charlie One plane loses control, and if both of us lose control and the plane is endangering public property [23] it is his job to destroy the target.

(Testimony of John L. Culbert.)

Q. What type of plane were you piloting on the morning of March 8, 1950?

A. That was an F6-F Grumman fighter.

Q. Was that a one-pilot affair or were co-pilots involved, or were you by yourself, or just what was it?

A. No, sir, that is a single seat fighter.

Q. Referring to this date of March 8, 1950, at about the hour of 10:05 in the morning, will you explain to us as best you can, Mr. Culbert, what occurred when you were in flight with the drone that was involved in this accident that occurred at that time.

A. Well, we rendezvoused with the firing group on the southern end of Chocolate Mountain and we were running runs through the center of the Chocolate Mountain Range, from the lower tip to the mountain tip. I don't know what run it was, or nothing like that; we were on a southeasterly heading when the drone was hit and, of course, we—presuming the drone was hit by one of these firing planes the drone would go out of control. The Charlie One plane, which is of a two-seated type, was controlling the plane. The co-pilot was controlling the target and he was flying directly behind the drone, back a safe distance, and I was flying wing on him. When the plane was hit at approximately 8000 feet it went into a left turn and it was going into a steep spiral; [24] we were in the center of the Chocolate Mountain Range and, therefore, there was not much reason for trying to destroy the drone. It was going straight in.

(Testimony of John L. Culbert.)

Q. Was it usual practice when a drone plane got out of control that way you, being Charlie One, would be ordered to destroy it?

A. Only if the plane was going to endanger public property or——

Q. In your opinion at that time was it?

A. ——or leave the range itself.

Q. From where you were located in the air at that time and flying the position you were, do you have any opinion as to whether or not that drone plane had gone out of control and was about to endanger private property?

A. In no way. It couldn't possibly have endangered any public property that was visible.

Q. You were up about 8000 feet?

A. Yes, sir.

Q. This mission you were on, what is that type of mission generally called? What is it referred to as?

A. That was air-to-air, nolo.

Q. What?

A. Nolo; that is a word derived from this type of operation, solo being one, there being no pilot on this it is called nolo. [25]

Q. How many planes, if you recall, both piloted planes and drone planes were involved in the particular mission that we have reference to in this case?

A. Well, there was three controlled planes in the target drone. For security reasons I don't believe I should tell anything of the firing group itself.

(Testimony of John L. Culbert.)

Mr. Rosensweig: Your Honor, may I make this statement at this time: that there are certain confidential matters that I have been unable to obtain, which cannot be divulged even at the time of trial; but if your Honor desires that information, your Honor can order the witness to answer.

The Court: Well, I don't think I would do that now. There is a way of getting these confidential communications providing they are not ultra strategic in these cases.

Mr. Rosensweig: Apparently that is where these particular records are presently lodged.

The Court: I want to know a little bit more about that no drone. Is that applicable to the target?

The Witness: What is that?

The Court: No drone.

The Witness: Nolo.

The Court: Yes, nolo.

The Witness: Well, on a dual flight you have more than one pilot; on a solo flight you have one pilot. They have to have some way to designate the type of operation, and when [26] there is no pilot they designate it a nolo operation. This is an air type. We have air-to-air, and surface.

The Court: That term applies to the drone itself?

The Witness: To the operation, yes, sir.

Q. (By Mr. Rosensweig): On this particular mission, Mr. Culbert, as I understand it, there was a plane piloted by yourself, there was a plane

(Testimony of John L. Culbert.)

piloted by Lieutenant or Ensign Stephenson, and co-piloted by Burton Smith, and there was the drone involved. Is that correct?

A. There is a little correction on that. The other plane was piloted by Lieutenant Smith and co-piloted by Stephenson.

Q. Then there were actually four planes involved in this particular operation?

A. Yes, sir. Correction on that, sir. There was three planes in the nolo group, and then there was a firing group. Ensign Stephenson and Lieutenant Smith was in one aircraft, and then there was the aircraft I was flying in, and the drone, which is three planes.

Q. How many planes were in the firing group?

A. That I can't disclose.

Q. I cannot hear you.

A. I don't believe I should disclose that information, sir.

Q. I see. How far were you away from the drone when [27] it was struck by the firing group, Mr. Culbert?

A. I estimate approximately 300 yards.

Q. Could you see the drone very clearly?

A. Yes, sir.

Q. Was the condition of the weather very clear?

A. Yes, sir.

Q. Any overcast or clouds or was it raining, or anything of that sort?

A. No, sir, ceiling visibility unlimited that day, sir.

(Testimony of John L. Culbert.)

Q. After the drone was struck by the firing group what did you first see?

A. The drone immediately went into a sharp left turn and proceeded into a deep spiral towards the ground.

Q. Did you seek to follow the drone down to the ground at all?

A. Well, immediately upon the left turn the Charlie One plane gave the control to me, which was the normal procedure in case it was his transmitter that went out, and I tried to regain control of the drone, and in doing so I followed the drone to the ground; yes, sir.

Q. Were you able to gain control of the drone?

A. No, sir, not at any time.

Q. Have you ever received any standing order, Mr. Culbert, that when one of these drones gets out of control [28] you are supposed to shoot it down?

A. The only orders I have received on that is that only if it was leaving the range or it was endangering Government property, and then my directions to shoot it down would be given by the pilot of Charlie One plane, which in that case would have been Lieutenant Smith.

Q. From your knowledge and experience in this particular field of aviation, Mr. Culbert, what is the usual practice concerning the destruction of those planes as they proceeded to the ground, when out of control, after they have been fired?

A. If the plane is going straight in or spiraling

(Testimony of John L. Culbert.)

fairly steep, where you can tell approximately where it is going to hit and it is not going to endanger any property, there is nothing possible to do there, nothing reasonable to do. However, if the plane seems to pull out of the spiral and leave—head towards the boundary of the area, even, the Charlie Two plane, which in that case was myself, would charge his guns and pull up close enough to the plane to destroy it completely.

Q. From your experience in this particular field of aviation, Mr. Culbert, how many of those drone planes are usually destroyed percentagewise, if you know?

A. Well, by the firing groups on this type of operation, on the air-to-air operation, I would say approximately [29] 90 per cent of the drones are lost in the firing, a very small percentage of those, however, having to be shot down by the pilots. I say out of 90 per cent maybe five per cent would have to be destroyed by the Charlie Two plane.

Q. Do you have any knowledge, Mr. Culbert, as to the extent of the area of the Chocolate Mountain Gunnery Range?

A. To my memory that range, the longest point from south to north is approximately 70 miles and the widest point on that range was approximately 27 miles.

Q. Mr. Culbert, I show you a map that is designated in the extreme top portion of it, "Danger—no trespassing, Camp Dunlop Aerial Gunnery Range, U. S. Naval Air Bases, San Diego, Cali-

(Testimony of John L. Culbert.)

fornia," and ask you whether or not in your opinion the heavy white lines which appear upon that map delineate the area generally known as the Chocolate Mountain Gunnery Range?

A. To the best of my knowledge.

Q. Could you indicate to us from that map, Mr. Culbert, approximately where the power lines were located and where this mission that you were seeking to accomplish was taking place?

A. We were firing from the southeast tip, we were running from this tip to the longest tip here, of course, turning inside to give us plenty of room in case they would lose control, and we were right in the center of the range [30] when it went out of control, and in going down to investigate the crash afterwards I noticed when I finally—it was the first time I noticed the high lines was between the bend and the fork of this road that runs along the high lines, which would be approximately this position right here.

Mr. Rosensweig: May I have a pencil so I can mark that?

The Court: Yes.

Q. (By Mr. Rosensweig): Can you mark a round circle about where you believe it is. It is pretty difficult to see, your Honor, on a black map. Maybe the Clerk has a colored pencil?

The Clerk: No.

Mr. Rosensweig: May I offer this, your Honor, as Defendant's Exhibit No. 1?

(Testimony of John L. Culbert.)

The Court: So received and marked Defendant's Exhibit A.

Q. (By Mr. Rosensweig): Mr. Culbert, when you were seeking to accomplish this mission that you were on the day in question, March 8, 1950, and at the time that this drone plane was fired upon, as you followed it down to the surface of the ground did anything unusual happen that you recall?

A. No, sir, nothing unusual to normal operation.

Q. It was the same, ordinary procedure that you had gone through on many, many occasions? Is that correct?

A. Yes, sir. We have a set procedure for these operations. [31]

Mr. Rosensweig: Your witness.

Cross-Examination

By Mr. Carman:

Q. Mr. Culbert, before starting out on the gunnery mission, did you have a briefing?

A. Yes, sir. We have a firing conference with firing groups prior to every operation.

Q. At that briefing was the presence of the power line pointed out to you?

A. The Chocolate Mountain Range was pointed out to us. The lines were marked on the chart; yes, sir.

Q. Was the power line itself pointed out to you?

A. Not to the point, no sir.

(Testimony of John L. Culbert.)

Q. Did you have any knowledge that it was there when you were firing on the drone target plane?

A. Yes, sir, I had seen it on the chart.

Q. You say you were flying at an altitude of approximately 8000 feet at the time the drone was struck?

A. Yes, sir.

Q. Could you see the power line from that altitude?

A. No, sir.

Q. You could not have seen it had you been looking?

A. I believe it would be impossible. Power lines are aluminum colored and pretty hard to see on that desert.

Q. But you had known the power line was down there, [32] you had seen a map and sketch and knew the approximate location of the power line with relation to the range?

A. Yes, sir.

Q. Could your exercises have been conducted in such a manner that you would not have to fly that mission over the power line?

A. I could answer that either way. It wouldn't fully accomplish our mission, not be a satisfactory operation to shorten the range where we wouldn't have to cross the power line.

Q. How long and how wide is the range, do you have any idea?

A. As I stated before, approximately 70 miles long and 27 miles wide.

Q. Where is the power line located with relation to the range?

A. It is perpendicular to the left of the range

(Testimony of John L. Culbert.)

approximately halfway up.

Q. So that you would have a course, then, of about 35 miles to fly if you went only to the power line and then turned around?

A. It wouldn't be 35 miles if we turned within a safe limit.

Q. Yes, all right. However, you could have ceased firing approximately a few miles before you reached the power [33] line, then commenced again on the other side and still have conducted a satisfactory mission, could you not?

A. It would not be satisfactory; no, sir.

Q. How large a gas supply does this drone target plane have? How many hours can it stay up?

A. I can answer that several ways. We have several types of auxiliary tanks we can install in the cockpit and we can arrange that anywhere from an hour and a half to four hours.

Q. With the drone plane that was out on March 8th, what was the gas supply?

A. Approximately two hours.

Q. What time did the mission start?

A. That I cannot recall.

Q. Was it before 9:00 o'clock?

A. I can't recall that, sir.

Q. Was any investigation made of the plane after the accident?

A. As I followed it down my order, received from Lieutenant Smith, was to drop to the ground and investigate the wreckage, and this being of a—the drone being of confidential—certain parts of it are confidential matter to the Navy, if there was

(Testimony of John L. Culbert.)

any large portion of it left a guard would have been set out immediately to stand guard on it. So I was ordered down to investigate the wreckage, and [34] the drone was completely destroyed and after we returned to the base a party was sent out, to my knowledge.

Q. Did you land at that time and investigate the wreckage or just passed over it?

A. I only passed over it, sir.

Q. Do you know if the investigation showed whether or not there was any gasoline left in the tank of the drone plane?

A. There wasn't enough of the tank left, sir, to tell that.

Q. Had there been gasoline in the tank when the drone crashed, is it not quite probable that the drone would have burned?

A. I believe I would be unable to answer that question. It would be a 50-50 deal.

Q. Did you have any orders as to how long you were to stay up firing on the gunnery range?

A. Yes, sir, all our firing exercises have a time of termination.

Q. Were you ordered to return the plane to the base or was it to be destroyed at the range?

A. If the plane was not destroyed by the firing group it was to be returned to the base.

Q. You say your job as Charlie Two is to destroy the plane if it appears to go off the range or if it endangers [35] public property. Is that correct?

A. Yes, sir.

(Testimony of John L. Culbert.)

Q. And you followed the drone plane down to what altitude after it struck?

A. When I passed over the drone I would say I was at approximately 50 to 100 feet.

Q. Were you able to see, before the drone struck, that it was quite likely to fly into the power line?

A. No, sir, I never saw the power lines until I went down—until I was clear to the ground, investigating the drone, and I saw the power lines at that time, and Lieutenant Smith was following me in and I warned him, and to my knowledge that is the first time I realized power lines were there.

Q. Do you have any method of destroying the drone other than by shooting it down? Do you have any radio control by which you can destroy it?

A. No, sir.

Mr. Carman: That is all.

Redirect Examination

By Mr. Rosensweig:

I just have one or two more questions, your Honor.

Q. Mr. Culbert, I believe you testified that you examined the map prior to the time you went on this mission. Is that correct? [36]

A. Yes, sir, all firing ranges and caution areas are marked on maps and displayed in our radio rooms.

Q. And on these maps there are particular

(Testimony of John L. Culbert.)

markings concerning habitation, concerning cattle, farms, electric lines, and things of that sort. Is that correct? A. Any permanent fixtures.

Q. They are all indicated on those particular maps? A. Yes.

Q. Had you known, Mr. Culbert, that these power lines were immediately in the vicinity of where that mission was being accomplished and where the drone went out of control would your actions have been any different, had you known those power lines were there, than what you actually did under the circumstances? A. No, sir.

Q. They would have been the same?

A. Yes, sir.

Mr. Rosensweig: That is all.

The Court: Mr. Culbert, did the drone go out of the direction of either of the planes, the one you were flying or the one the other man was flying, after it was hit?

The Witness: I don't quite understand, your Honor. It did change the direction of our course, yes, sir, but it was kept in front of my plane at all times.

The Court: Could you direct its course after it was [37] struck?

The Witness: No, sir.

The Court: Could the other plane direct it?

The Witness: No, sir.

The Court: The purpose of the mission was to destroy the plane, wasn't it? One of the objectives

(Testimony of John L. Culbert.)

of the mission? I am not asking for any strategic matter.

The Witness: For morale purposes of the gunnery, if it was possible for them to destroy the plane, yes, sir, that was the mission.

The Court: In other words, a test of marksmanship, wasn't it?

The Witness: This drone-type of firing is one of the finished phases of firing. It gives the pilot and the gunnery crews the nearest thing to actual combat, readying him for combat firing.

The Court: I don't know that I understood one of your answers. I understood you to say that one of the objectives of the mission was to bring the drone plane into the airport.

The Witness: If a firing group is unable to destroy the plane it is returned and landed at the home base and used all over again.

The Court: In other words, if they failed in the marksmanship test the drone is brought back into the field.

The Witness: Yes, sir. [38]

The Court: But the purpose of the mission was not that. The objective of the mission was to destroy the drone?

The Witness: If possible, yes.

The Court: And the test that the men were put to was to determine their efficiency in that operation?

The Witness: Yes, sir.

The Court: I wasn't clear on one answer. I

(Testimony of John L. Culbert.)

think I am, but I am going to ask you again. After the target was struck there was no way for either of the planes, one or two, to direct its course?

The Witness: No, sir, no way whatsoever.

The Court: Are you able to estimate the height at which the drone was flying when it was struck?

The Witness: Yes, sir, approximately a thousand feet.

The Court: Were you proceeding or following at that time?

The Witness: I was following.

The Court: At about the same elevation?

The Witness: Same elevation, yes, sir.

The Court: Where was plane No. 1?

The Witness: I was flying wing on plane No. 1. It was directly behind the drone, I would estimate 300 yards.

The Court: Where was plane No. 2?

The Witness: I was plane No. 2, sir.

The Court: There were two planes? [39]

The Witness: Two control planes, yes, sir.

The Court: Where was the other plane?

The Witness: There were two control planes and the drone, sir.

The Court: Oh! Well, were they both flying together, the two planes?

The Witness: Yes, sir, the two control planes were flying wing.

The Court: As you were under order to descend

(Testimony of John L. Culbert.)

to make an inspection, how close did you come to the terrain where the plane had landed?

The Witness: Approximately 50 to 100 feet.

The Court: Did you say your orders were to alight or to inspect.

The Witness: Just only to inspect, sir. There would have been no way to land in that terrain.

The Court: Too mountainous?

The Witness: Yes, sir, it is rather hilly, and we would be unable to land aircraft in that soft a sand.

The Court: Could you clearly see the power lines at that time?

The Witness: Only when I approached the wreckage of the drone at low altitude did I notice the power lines.

The Court: That is all.

(Witness excused.) [40]

Mr. Rosensweig: I will call Burton Smith.

BURTON EDWARD SMITH

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please.

The Witness: Burton Edward Smith.

Direct Examination

By Mr. Rosensweig:

Q. What is your rank in the United States Navy?
A. Senior lieutenant, sir.

(Testimony of Burton Edward Smith.)

Q. How long have you been a senior lieutenant?

A. For approximately five years.

Q. What department or division of the Navy are you connected with?

A. Naval aviation, sir.

Q. How long have you been connected with that division or department of the Navy?

A. Approximately nine years, sir.

Q. Are you a pilot, Lieutenant?

A. Yes, sir.

Q. How long have you piloted airplanes?

A. For approximately nine years, sir.

Q. That has been all in the Navy? [41]

A. Yes, sir.

Q. What type of planes have you piloted?

A. I have piloted single engine, twin engine aircraft, and four engine aircraft.

Q. Have you instructed other pilots?

A. Yes, sir.

Q. How long have you instructed other pilots?

A. I have instructed for approximately two years, sir.

Q. How long were you connected and have you been connected with the drone operation of planes, Lieutenant?

A. I was with that type of squadron for approximately two and one-half years.

Q. Are you so presently engaged?

A. No, sir, I have just recently been transferred.

Q. Have you been connected with the operation

(Testimony of Burton Edward Smith.)

of drone planes both from the technical operation of them and from the operation of gunnery practice on them?

A. From all phases, from aviators' standpoints.

Q. You have had experience in firing upon drones, have you not?

A. No, sir, I have not.

Q. But you have had experience, about two and one-half years' experience, in the control of drones?

A. Yes, sir.

Q. And that is the particular field of drone airplanes [42] in which you are particularly qualified. Is that correct?

A. Yes, sir.

Q. Calling you attention, Lieutenant, to the date of March 8, 1950, about the hour of 10:05 a.m., in the area generally known and described as the Chocolate Mountain Gunnery Range, were you present on that day and about that time in that area?

A. Yes, sir, I was.

Q. Will you tell us what occurred, commencing from the time you took off in the morning until such time as an accident occurred there involving a drone and certain power lines belonging to the California Electric Power Company.

A. Yes, sir. The exact time of takeoff I don't remember, but we were conducting an exercise in the Chocolate Gunnery area; there were a number of planes firing on our drone. We were at approximately 8000 feet conducting these firing exercises. Just how many runs occurred before the drone was shot down I don't remember, but on one of the runs

(Testimony of Burton Edward Smith.)

the drone was finally hit, when the drone was hit it immediately went into a steep turn, spiraling towards the ground. At that time Charlie One, which was the plane I was flying in, we gave control to Charlie Two, to see whether he could possibly regain the control that we lost. We made every effort to gain control of it and was unable to do so. We were over our firing area and there was no reason to give an order to [43] Charlie Two to try and destroy the plane, and so far as—I would like to explain, destroying the aircraft, you do not destroy the aircraft to stop the aircraft from progressing, you shoot it down. When you destroy it it doesn't disintergrate in the air, you merely stop it and it goes down some place in that area, and there was no reason from my experience to give such a type of order. The drone crashed, and because Charlie Two is a fighter-type aircraft, he was able to dive, and naturally able to get down to the ground a lot faster than I am in a twin engine aircraft, so he was ordered to proceed immediately to investigate it before I could get down there, and he investigated the wreckage, and also said that the drone had crashed into the power lines.

Q. Lieutenant, over what period of time had you flown missions over that Chocolate Mountain Range?

A. We had conducted the exercises over there for a number of weeks, the exact number I don't know, sir.

Q. Did you have any knowledge during the

(Testimony of Burton Edward Smith.)

period of time you were conducting the missions, these practice runs, whatever you call them, of any power lines in the area?

A. Only from the fact that the maps that we used indicated that there was a power line in that firing area.

Q. But other than the fact that these power lines had been pointed out to you, or you saw them on the maps, you never did actually see the power lines prior to the time they [44] were called to your attention. Is that correct? A. No, sir.

Q. Do you recall how long you had been in the air prior to the time you lost control of the drone?

A. I would only be guessing, sir.

Q. Guess some approximation.

A. I would say one-half hour to forty-five minutes.

Q. Do you recall whether anything unusual happened in the operation of this particular mission? A. Nothing unusual happened, sir.

Q. What has been your experience, Lieutenant, concerning the number of drone planes that are taken into the air for gunnery practice, of the type that was involved on this particular day, are actually destroyed?

A. Almost every aircraft we take out on a firing exercise that is being fired upon by other planes is usually destroyed. There is a small percentage that we do bring back.

(Testimony of Burton Edward Smith.)

Q. These drone planes, they were generally controlled by radio control, were they not?

A. Yes, sir.

Q. And when the practicing gunner on the gunnery aircraft destroys the radio by which the drone is controlled then you lose control of the drone itself, do you not?

A. That is correct, sir. [45]

Q. Is there any other way you can lose control of the drone?

A. It is possible to have some type of radio trouble with the electrical operating, that something could have occurred that we lost control. That is one reason we have another plane with the same type of equipment we have.

Q. At the time these drones are flying in the air they are under motive power themselves, are they not?

A. Yes, sir, but for directional control they are by radio, sir.

Q. Assume, Lieutenant, that one of these gunners on one of the other planes in the gunnery practice happened to strike the motor and not the radio control, could you still control that plane?

A. By the direction of the aircraft, yes, sir.

Q. But once the radio equipment in the drone is injured or destroyed you, as, I suppose, the "mother" plane lose control of the drone. Isn't that correct?

A. Yes, sir.

Q. In your experience and from your background as a Navy pilot, on the occasion in question, Lieutenant, was this a normal operation?

(Testimony of Burton Edward Smith.)

A. Yes, sir.

Q. There was nothing unusual about it?

A. No, sir. [46]

Q. You received your orders and directions to go on this particular mission and you returned as mission accomplished. Is that correct?

A. Yes, sir.

Mr. Rosensweig: Your witness.

Cross-Examination

By Mr. Carman:

Q. Lieutenant Smith, I understand that the plane took a sharp, left spiral turn after it was hit, the drone plane, that is. A. Yes, sir.

Q. Did it go directly down?

A. In a spiral—a spiral is in a left-hand turn, loss of altitude, not in a steep dive.

Q. So it probably went left not directly where it was hit but in a relatively small area beneath which it was hit.

A. No, not necessarily; it was covering quite a large area, although it was still entirely within the firing area.

Q. Were any of the pilots or all of the pilots given orders not to fire on the drone when they were in the vicinity of the power line?

A. No, sir. I would like to explain on that, that anything within the firing area—it is presumed there is nothing in there to destroy or endanger. I mean, there is actual firing done, and so far as that is concerned in firing [47] areas anything

(Testimony of Burton Edward Smith.)

below that is—there is nothing to hurt or destroy, or anything else, so long as the exercise is conducted over that area, there is nothing can be hurt.

Q. So far as your orders were concerned, then, it was perfectly all right for the plane to be shot down within any place in the gunnery range?

A. Yes, sir.

Mr. Carman: That is all.

Mr. Rosensweig: I have no further questions.

The Court: I did not understand one answer, Lieutenant; maybe it was because I did not get it clearly. Mr. Rosensweig asked you here about the target having been struck. I think he said if in the engine, whether or not there would be any loss of direction or power to the planes, plane No. 1 and plane No. 2. Is that true?

The Witness: Well, sir, if the drone was shot in the engine naturally it loses its power to remain airborne and it would have to go down, although we would have the directional control in turns and making the nose go up and down. But, naturally, the power that keeps the airplane in the air is the engine, and if that was shot it would bring the plane down.

The Court: In other words, that would be Newton's Law of Gravitation; it would fall.

The Witness: Yes, sir. [48]

The Court: I don't mean that. What I mean is this, Lieutenant: If the target were struck so as to disable it from being an airborne instrumen-

(Testimony of Burton Edward Smith.)

talities, is there any way that the directional plane, the two planes that have been mentioned by the young man who testified, could direct where that plan would fall, where the target would fall, the drone?

The Witness: It is possible that so long as the radio equipment remained in good condition. Does that answer it?

The Court: Yes. I think that connotes that in order to destroy the directional element on your two planes, either of them, that the target must be struck in a vulnerable point that would put the controls out of commission.

The Witness: Yes, sir.

The Court: That was the case here, wasn't it?

The Witness: Yes, sir, and it usually is. I mean, the exercises that are conducted by a firing group are very fast, and a number of runs are made, and they usually, eventually always shoot it down unless they are very new pilots and they have had very little experience. But by the time they give this exercise with the drone they are usually very capable.

The Court: At what relative speed does the drone proceed with respect to the speed of the other two planes, the control planes?

The Witness: The TD-2 varies, because we do use evasive tactics to create regular fighter tactics; but I would say the speeds varied, would vary between 110 knots and, say, 150 knots. [49]

The Court: Do you know at what speed the

(Testimony of Burton Edward Smith.)

target was proceeding when it was struck, approximately, or is that something you don't want to publicize.

A. No, sir, it is not that. I mean, it occurred well over a year ago and I would just be guessing, sir.

The Court: Had there been any communication, using that term that sometimes I don't understand: briefing, about the location of the power lines there and the terrain around the Chocolate Mountain Range.

The Witness: There was no indication of anything specifically within the firing area, although we were given maps that would indicate to us anything that was within that area and, of course, all outside of the area.

The Court: The firing area was the whole of that mountain chain, wasn't it?

The Witness: Pardon?

The Court: Was the firing area all of that mountain chain at that time?

The Witness: Yes.

The Court: It wasn't restricted to any part?

The Witness: No, no, sir, the entire area was ours. In fact, in order to properly conduct the exercise almost the entire area had to be used, because we couldn't accomplish our mission properly if we didn't.

The Court: You could not have the military operation [50] without having the extensive area within which to operate, could you?

(Testimony of Burton Edward Smith.)

The Witness: No, sir.

The Court: I have nothing further.

Mr. Rosensweig: I have one or two more questions, if I may, your Honor.

Redirect Examination

By Mr. Rosensweig:

Q. I believe you said, Lieutenant, you had about two and one half years' experience in the operation of drone controlled airplanes. Is that correct?

A. Yes, sir.

Q. And you had about the same amount of experience—was that in the area of the Chocolate Mountain Gunnery Range, all that experience that you acquired, was that acquired in that area?

A. No, sir.

Q. During that two and one half years' experience that you got with the control of drone airplanes, was that likewise inclusive of experience that likewise was acquired with other airplanes firing upon the drone?

A. I don't exactly understand your question.

Mr. Rosensweig: Let me withdraw the original question and frame it this way:

Q. The two and one half years' experience you had with [51] drones would that include firing by other airplanes upon drones?

A. Oh, yes, sir.

Q. During this two and one half years' experience you had with drone airplanes, about how many missions have you got, approximately.

(Testimony of Burton Edward Smith.)

A. Well, I would approximate on firing from other aircraft approximately 20; a great deal of our exercises are conducted with ships also.

The Court: You mean surface boats?

The Witness: Yes, sir.

Q. (By Mr. Rosensweig): You have had about 20 missions that were similar or the same as the one in question?

A. Oh, yes, sir.

Q. In which this accident occurred?

A. Yes, sir.

Q. Was there anything different between the other 19 you went on and the one in question?

A. No, sir.

Q. It was all the same pattern?

A. Yes, sir.

Q. There was nothing unusual that occurred?

A. No, sir.

Mr. Rosensweig: No further questions.

Mr. Carman: Nothing further. [52]

(Witness excused.)

Mr. Rosensweig: Call Mr. Stephenson, please.

CLAUDE MARTIN STEPHENSON

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name.

The Witness: Claude Martin Stephenson.

(Testimony of Claude Martin Stephenson.)

Direct Examination

By Mr. Rosensweig:

Q. What is your rate, Mr. Stephenson?

A. Lieutenant, junior grade.

Q. How long have you been a lieutenant junior grade?

A. Approximately two months.

Q. On March 8, 1950, what was your grade at that time?

A. Ensign.

Q. What experience, Lieutenant, have you had in the operation of aircraft in the Navy?

A. I received my wings the 14th of July, 1948. I have been flying since that time.

Q. Did you have any aircraft experience prior to your joining the Navy?

A. No.

Q. Where did you receive your wings?

A. At the Naval Air Station, Corpus Christi.

Q. From there where were you assigned?

A. I was assigned to a utility squadron in the San Diego area.

Q. When did you become connected with the operation of drone airplanes?

A. In January of 1949.

Q. At the time you became connected with that particular operation where were you stationed?

A. At the Naval Air Station, Santa Ana.

Q. What has been your particular experience in the field of drone operation of airplanes?

A. I have been associated with drone operations since January of 1949 until approximately two months ago.

(Testimony of Claude Martin Stephenson.)

Q. In the performance of your duties, Lieutenant, with the drone operation of airplanes, where did all these exercises and missions take place particularly?

A. They took place around, out over the—at sea, or in the Chocolate Mountain Gunnery area.

Q. How many missions did you go on in the area of the Chocolate Mountain Gunnery range?

A. I don't recall. I would estimate somewhere between five and ten.

Q. You generally were a pilot or a co-pilot?

A. We varied in performance of the duties in connection with the operation. Sometimes I was the control plane, [54] I was in control of the drone as Charlie One, and sometimes I was Charlie Two.

Q. On the date in question, which would be March 8, 1950, about the hour of 10:05 a.m., wherein a drone struck a certain power line that belongs to the California Electric Power Company, do you recall that particular occasion?

A. Yes, sir, I do.

Q. What were your duties on that particular day? Were you a pilot or a co-pilot?

A. I was in the co-pilot's seat, the right seat; Lieutenant Smith was on my left as the pilot, and I was controlling the drone as Charlie One.

Q. You were controlling the drone at the particular moment when it went out of control, or before or after, or what?

A. I was controlling the drone up until the time it went out of control.

(Testimony of Claude Martin Stephenson.)

Q. How long had you been in control of it?

A. I don't remember the take-off time, but it was from——

Q. Approximately what period of time were you actually in control of that drone, if you recall?

A. I couldn't—it would be a pure guess.

Q. But you do know you were in control of it at the time it went out of control? [55]

A. Yes, sir, I was.

Q. Would you tell us in your own words, Lieutenant, what occurred immediately prior to and up to the time the drone went out of control.

A. We had rendezvoused and made a series of runs from the southeast end of the area to the northwest, and had reversed our course and were on a southeast heading at the time the drone was hit, and the drone, upon being hit, executed a violent left turn, commencing a spiral, and I immediately had no control, further control. I told Charlie Two to take control and he acknowledged that he had his radio control gear on, but had no control of the drone. The drone continued in a spiral down, increasing speed, and the diameter of the spiral I couldn't say accurately, I would estimate between four and five miles in diameter, and I lost sight of it. The next time I saw it was just prior to the time it hit the ground, and I then saw a cloud of dust.

Q. At the time that the drone—you lost control of the drone, at what height were you flying?

A. About a thousand feet.

(Testimony of Claude Martin Stephenson.)

Q. What was the condition of the weather.

A. Ceiling and visibility unlimited.

Q. How long had you been stationed at or near this Chocolate Mountain Gunnery Range during the period of time you went on these ten missions?

A. Well, our home base was at the Marine Corps Air Station, El Toro, and when we were scheduled for operation in that area we would send a detachment to the Naval Air Station at El Centro, and we would take a detachment to El Centro and back to El Toro almost every week.

Q. At the time you went on these missions, Lieutenant, did you have occasion to examine certain maps and plats of the Chocolate Mountain Range? A. Yes, I did.

Q. Did you have any knowledge during the missions that you went on, including the mission involved in this particular case, that there were any power lines in the area of the Chocolate Mountain Range?

A. In the briefing I had seen the charts and the power lines were marked on these charts, but flying over the gunnery range my attention is more on the drone rather than just exactly where I am in the gunnery area, as long as I know I am in the area, and I did not know the exact location on the ground of the lines.

Q. Did you ever see the power lines prior to the time they were struck?

A. No, I didn't.

Q. You say you flew over the gunnery range

(Testimony of Claude Martin Stephenson.)

about ten different times or on ten different missions?

A. Yes, I had been on—between five and ten—I [57] would say it was closer to—well, I couldn't say; between five and ten times.

Q. In other words, though, you did criss-cross this area of the Chocolate Mountain Range on many occasions? A. Yes, I did.

Q. And you never actually saw the power lines until such time as this accident occurred?

A. That is correct.

Q. Did you follow Mr. Culbert down to examine the drone that had struck the power line?

A. Well, Lieutenant Smith was the pilot and naturally, Culbert, being in the fighter plane, could get down sooner. We went down and flew, I would estimate, around 100 feet, and saw the wreckage of the drone and the power lines. We did not—we made about one or two passes over the drone and didn't notice—I didn't notice the amount of damage that was done to the power lines.

Q. When you went down to see where the drone had struck the ground, did you notice the power lines at that time?

A. Culbert called us and told us to watch out for the power lines.

Q. That was the first time you had any knowledge that the power lines were there. Is that correct?

A. In that particular location, yes, sir, that is true. [58]

(Testimony of Claude Martin Stephenson.)

Q. From your knowledge and experience in the field of operation of controlled aircraft, was this a usual operation, this mission that you were flying on on the date this accident happened?

A. Yes, it was.

Q. Did anything unusual occur?

A. Not a thing, sir.

Q. It was the same operation that occurred on other operations you have been on?

A. Yes, sir, it was a set routine.

Q. In other words, it was a normal operation?

A. Yes, sir.

Mr. Rosensweig: No further questions.

Cross-Examination

By Mr. Carman:

Q. Lieutenant, could this target plane have crashed through some other cause than a bullet being lodged in its radio equipment?

A. Prior to the operation we make several checks, and the aircraft is in operating condition, the drone is in operating condition in all respects before we take it off. There is a chance, very small I would estimate, that the drone purely of its own accord would go out of control.

Q. If something went wrong with the radio equipment of the drone then neither the Charlie One nor Charlie Two [59] planes could control the drone. Is that correct?

A. That is correct.

(Testimony of Claude Martin Stephenson.)

Q. Was an inspection made of this drone plane before this particular mission?

A. Yes, it was.

Q. Was the radio equipment in perfect condition at that time?

A. Yes, it was.

Q. Did you receive orders or did you know of orders received by the pilots that were flying on this drone plane that firing was not to be done in the vicinity of the power lines?

A. No. The fact that we were in the Chocolate Mountain area, we assumed that there was nothing we could hurt in that area.

Q. No one in higher authority, then, pointed out to you that there was a power line down there and that you should be careful of it. Is that correct?

A. That is correct.

Mr. Carman: I have no further questions, your Honor.

The Court: Perhaps one or two questions, Lieutenant. How is the drone put in the air, in flight?

The Witness: On the runway we have a controlled truck, the drone is placed in position, lined up with the runway and the truck has an electronic gear in it, the truck takes [60] off the drones and once it is in the air he turns the control over to Charlie One, which in this case was myself.

The Court: You estimate the diameter of the fall after the drone was struck to be four or five miles. How did you arrive at that estimate?

The Witness: Well, the drone as it was hit was relatively slow, as it went into the dive it increased

(Testimony of Claude Martin Stephenson.)

speed and being in a turn, as it went faster the diameter increased, and by that I mean that you couldn't pick the exact spot over the ground where that thing was going to crash at the instant it was hit. It was in an ever increasing spiral as the speed increased, and at the time it was hit it was going quite fast, I would estimate in a four or five mile diameter.

The Court: You saw the place where the drone landed?

The Witness: Yes, sir, I went down afterwards.

The Court: Could you indicate the direction which it took with respect to the compass.

The Witness: When it hit?

The Court: Yes.

The Witness: I saw it just immediately before it hit and it was going in a southeasterly direction.

The Court: Where would this power line and the portion of it that was damaged, where would that be with respect to the place that you just described, directionally, I mean. [61]

The Witness: You mean in which direction the power lines run?

The Court: No, I mean where was the target when it began to precipitate itself toward the earth, with respect to the power lines; approximately.

The Witness: I don't know, sir.

The Court: Have you any idea how far away from the power line it was flying at that time?

(Testimony of Claude Martin Stephenson.)

The Witness: No, sir, that incident took place too fast, and I didn't notice any particular points at the ground level.

The Court: But you think that the circumambient situation extended four or five miles before it struck?

The Witness: That is my opinion.

The Court: It started in a smaller circle, of course, and then enlarged as it descended?

The Witness: Yes, sir. It only made about—I was going to guess the number of circles it made. I can't give you that either.

The Court: 8000 feet in the air?

The Witness: 8000 feet, a relatively short time before it crashed, maybe 30 seconds.

The Court: That is all.

Mr. Rosensweig: No further questions. You may step down, unless you have some questions, Mr. Carman. [62]

Mr. Carman: That is all.

(Witness excused.)

Mr. Rosensweig: The Government rests, your Honor.

The Court: We will hear the rest this afternoon at 2:00 o'clock.

(Whereupon the noon recess was taken to reconvene at 2:00 o'clock p.m. of the same day.) [63]

Afternoon Session

The Court: Proceed, gentlemen.

Mr. Rosensweig: Just prior to the noon recess, your Honor, the Government rested its case concerning the introduction of any testimony.

At the conclusion, the Government again desires to review its motion to dismiss plaintiff's case on the grounds previously stated and, particularly again, not for the purpose of repetition, your Honor, but for the purpose of clarity, I wish to state that the Government's position is based upon three main points and three main factors, and they are as follows: That Congress has not consented under the Tort Claims Act for the imposition of any liability upon the United States or the Government on a theory of liability - without - fault. Number two, that the doctrine of *res ipsa loquitur* is inapplicable in a case of this character. Number three, that plaintiff has failed entirely to introduce or show by any evidence to support its position that any agent, servant and/or employee of the Government was negligent in the operation of the plane, or the drone which is alleged to have caused the damage which plaintiff sustained.

Those are the main grounds upon which the Government asks for a dismissal of this case and renews its motion upon those given grounds. [64]

The Court: I don't know whether all the evidence is in yet or not. Mr. Carman, do you have anything further you want to admit?

Mr. Carman: No, we have no further evidence, your Honor.

The Court: Then the record will show counsel's statement before Mr. Rosensweig's argument, and the motion will be denied without prejudice to the determination of the case, on the minutes.

Do you want to argue the case, Mr. Carman?

Mr. Carman: Yes, your Honor.

The Court: Proceed.

Mr. Carman: Defendant is liable to plaintiff for the negligent injury that it caused. Defendant knew of the exact location of plaintiff's power line, was under a duty to observe the necessary safeguards to prevent damage to that line; no precautions were taken. In fact, the uncontradicted evidence is that the pilots all believed that it was perfectly all right to shoot down and allow the drone plane to crash anywhere within the confines of the range. Had reasonable precautions been taken this accident would not have occurred.

In *Brouse versus United States*, 83 Federal Supplement 373, a Federal Tort claimant's case, and Army "Black Widow" fighter flying under robot control collided with an Aeronca Cub airplane, causing the small plane to crash and [65] kill the occupants. The Army pilot testified he kept a constant lookout for other planes, that he didn't know his plane collided with the Cub, nor what caused the damage to his plane. In holding the defendant liable, the Court, at Page 374 stated: "At the time of the collision the Black Widow fighter was flying through the air totally oblivious to its potential danger to other planes and wholly unmindful of its duty to observe the necessary safeguards to

prevent disaster. Had a proper lookout been maintained the collision would not have occurred. The plaintiff's rights of recovery are beyond question."

Plaintiff also relies on the doctrine of *res ipsa loquitur*. That doctrine is applicable in California. It is available under a general allegation of negligence and it has been provided in a Federal Tort Claims case arising in California, *San Diego Gas and Electric Company versus the United States*, 173 Federal second, 192, that involved crashing of an airplane into a transmission line. The doctrine applies, of course, where the instrumentality causing the damage was within the exclusive control of defendant, where plaintiff was without fault and where the accident is one which would not ordinarily have occurred in the absence of negligence.

It is obvious here plaintiff was without fault, that defendant had exclusive control of the target plane. [66] Here we have one lone power line located on defendant's gunnery range. Defendant certainly knew the exact location of that power line and was under a duty to observe safeguards necessary to prevent damage to the lines. Had it taken reasonable precautions, this accident would not have occurred.

Defendant has not shown that it was free of negligence, in fact, the uncontradicted testimony indicates there was negligence here, that no precautions were taken to prevent plaintiff's property from being damaged. Defendant, therefore, is liable. But, even assuming that defendant was entirely free of negligence, it is still liable to plain-

tiff for the damage it caused because it was engaged in an ultra hazardous activity and was liable without fault.

Counsel for the defendant alleges or contends that Government is not liable under the Tort Claims Act in the absence of negligence. The Federal Tort Claims Act provides the United States is liable for all the negligent or wrongful acts or omission of any employee of the Government while acting within the scope of its office and employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. It is quite true many of these ultra hazardous activities are not prohibited or prevented by law but at the same time when an accident occurs as a result of such activities, at least [67] so far as plaintiff is concerned, he has been wronged, there has been a wrongful act, he has been injured.

It seems to me the important point, the real heart of the Tort Claims Act, looking for the reason behind it, it is found in the last sentence which provides that "the Government is liable under the circumstances for the United States, if a private party would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Under the law of the State of California defendant would be liable to the plaintiff in this case.

The California Supreme Court in *Green versus General Petroleum Corporation*, 205 California

328, sets out the reason for the rule and then states the rule itself at page 333:

“Where one in the conduct and maintenance of an enterprise lawful and proper in itself, deliberately does an act under known conditions, and, with knowledge that injury may result to another, proceeds, and injury is done to the other as the direct and proximate consequence of the act, however carefully done, the one who does the act and causes the injury should in all fairness, be required to compensate the other for the [68] damage done.”

At the same page the Court said:

“It ought to be, and we are of the view it is the rule that, where an injury arises out of, or is caused directly and proximately by the contemplated act or thing in question, without the interposition of any external or independent agency which was not or could not be foreseen, there is an absolute liability for the consequential damage regardless of any element of negligence either in the doing of the act or in the construction, use or maintenance or object or instrumentality, that may have caused the injury.”

The Restatement of Torts, Section 520, defines ultra hazardous activities as one which, (a) “necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care; and (b), is not a matter of common usage.”

The activity engaged in in this case falls squarely within that definition. Plaintiff's position in this case is very well stated by the Court in *Rochester Gas & Electric Corporation versus Dunlop*, 266 New York Supplement 469. In that case defendant's airplane crashed into plaintiff's power [69] line while flying over plaintiff's land at night. Plaintiff on two separate counts alleges negligence, relying upon *res ipsa loquitur* and trespass. The lower court dismissed the cause of action based on negligence and submitted the question of trespass to the jury. The jury found for the defendant. On appeal the court held defendant liable to trespass as a matter of law. And at page 472 the Court said:

“It seems to me that the plaintiff proved one or the other of its causes of action. If it can be said from human experience that an airplane will not fall except through negligence, then the plaintiff proved a *prima facie* case under its first cause of action. If, on the other hand, common experience requires the opposite conclusion, namely, that, no matter how perfectly constructed or how carefully managed an airplane may be, it still may fall, then the man who takes it over another's land and kills his cow or knocks off his chimney, has committed an inexcusable trespass. It must be kept in mind that, when damage occurs in such a case, one or the other party has to stand it, and no reasonable remedy suggests

itself why it should not be the one who has brought about the chance occurrence." [70]

Thank you.

Mr. Rosensweig: May I be heard, your Honor?

The Court: Yes.

Mr. Rosensweig: I listened with a great deal of interest to Mr. Carman's argument on the question of the reasons why the Government should be held liable in this particular instance, and particularly when he mentioned the case of the San Diego Gas & Electric Company, which was one case I had the pleasure of trying before the Honorable Jacob Wineberger in San Diego. I happen to know something about that case and I can assure the Court and do assure the Court that case is entirely different from the facts we have here present. At the time of trial of this particular case it was definitely shown that the airplane involved was traveling I would say in violation of the Civil Aeronautical Rules and Regulations of California, in that it was flying at a height of less than 500 feet. Because the Court failed to take into consideration certain inferences which it should have taken in consideration at the time, our District Court reversed the decision. But in that particular case there was some evidence of negligence shown and in this particular case there is none, your Honor.

Counsel has cited the Dunlop case. That is a case that arose in New York, your Honor, in 1933, and it was a case that arose long prior to the

development and ordinary use [71] of the airplane as it is used today. Certainly it cannot be said that in 1933 the manufacturing development of the aircraft had developed to the degree that it has today, and as a result of it the Court at that particular time followed the rule of ultra hazardous activities, following the rule of liability-without-fault. Certainly in the development of the aircraft industry and passenger service and freight service by aircraft it cannot be said that aircraft travel and transportation is so unique today that it isn't a matter of common usage and common practice, and it is accepted in the same way as a mode of travel as are automobiles, trains, and ships. It certainly cannot be said that the airplane industry and airplane operation is in the field of ultra hazardous activities.

Counsel would have this Court impose upon the Government a liability - without - fault. The Tort Claims Act does not say that, your Honor. The Tort Claims Act says that the United States of America shall be liable for the negligent acts of its agents acting within the scope and duty of its employment. The language which he referred to "in a like manner" as if the Government were a private individual, it is my contention, your Honor, that the equation of the Government that it shall be liable in a like manner as a private individual does not come into play, and the comparisons cannot be made, until such time as the plaintiff [72] carries its burden of showing that some agent, servant and/or employee of the Government has

been negligent. Until there has been some showing of negligence the equation and comparison of the Government with a private individual not being brought into play there can be no recovery for the reason there has been shown no negligence on the part of any agent of the Government. The burden is upon the plaintiff to show that there has been some negligence. The Court has heard the testimony here. Plaintiff has failed to show any negligence and I submit for that particular reason judgment should be for the defendant.

Counsel has cited many cases, or, several cases involving falling airplanes, he has cited from the Dunlop case in New York. I believe he could have cited the Smith case in California. There are many other cases he could have cited concerning the rules of law relative to falling airplanes. But I will submit, your Honor, in every one of those cases where the doctrine of *res ipsa loquitur* is to be applied, that it involves an airplane carrying passengers for hire, and I submit a different rule must apply when we seek to invoke the doctrine of *res ipsa loquitur* where passengers for hire are being carried and those passengers are injured. A passenger is entitled to a very high degree of care because that is the basic rule of law that we understand. They pay a given fee, or compensation, to be transported [73] safely, knowing little or nothing about the operation of an airplane, or what causes the damaging of it, or what causes the airplane to fall, and certainly it can be said thousands of airplanes fall a year without anybody

knowing why they fell or how they fell. Certainly it can be said there are many mechanical failures which cause an airplane to fall, which are inexplicable. Yet the individual carrying in airplanes of fee-paying passengers is with the highest degree of care, and for that reason I think the doctrine of *res ipsa loquitur* can well be applied. But certainly it cannot be said in the case we have before us, and even the case that counsel referred to concerning the two airplanes that happened to crash in midair, certainly there are distinguishing features about those two particular cases. Those are cases where the pilots were in error. In this particular instance the pilots were not in error. They were merely following orders, they were on a mission, they had done a job in a manner they were supposed to have done it. There was nothing unusual about the happening of the accident, nothing unusual about the carrying out of their particular mission, and they did their mission as it was supposed to have been performed.

So far as the plaintiff is concerned he has failed entirely to show that any of the pilots here introduced at the time of the happening of that accident did anything upon [74] which the Tort Claims Act says the Government shall be liable for. Government shall be liable for the negligent or wrongful act of its agents acting within the scope and duty of its employment, and it was for those particular reasons, your Honor, that the doctrine of liability - without - fault is not one that could be

placed upon the Government under the Tort Claims Act.

Number two, there is no showing by the plaintiff of any negligence so far as the agents, servants and/or employees are concerned; and, three, your Honor, that the doctrine of *res ipsa loquitur* does not apply where passenger-carrying airplanes are not involved. The burden must be carried by the plaintiff to show such negligence and he has failed to carry it. I sincerely believe, your Honor, the judgment should be for the Government.

Mr. Carman: Counsel for defendant says the doctrine of *res ipsa loquitur* has not been applied in the case of a plane crashing and doing injury to property on the ground it is applicable only to where a common carrier is involved. The rules as to the application of the doctrine of *res ipsa loquitur* are well known. That doctrine applies, as has been said before, when the instrumentality causing the injury was under the exclusive control of the defendant; plaintiff was not at fault, and when the accident is one which would not ordinarily have occurred in the absence of negligence—— [75]

The Court: We seem to have the wrong number on that San Diego case.

Mr. Carman: 173 Federal second, 192.

The mere fact that the doctrine has not been applied in such a case is no sign it shouldn't be applied if a case falls within the rule under *res ipsa loquitur*, is applicable, it should be applied. Defendant contends in this case either the doctrine of *res ipsa loquitur* is applicable, which would be the case

if we can say this is not the type of accident which would ordinarily occur without negligence, and if we cannot say that, then this must be the type of accident which may happen even with the exercise of the utmost care. In the event, the doctrine of liability-without-fault is applicable.

Now counsel says that aviation has developed to such an extent that the doctrine of liability-without-fault is not now applicable to it. That may be. Aviation in general, that is, commercial aviation and, perhaps, military aviation—certainly there is a much greater risk involved, a much greater hazard created when a radio-controlled target plane is taken aloft and fired upon by the military services than there was in taking aloft the conventional type of airplane, even in the 30's. If something goes wrong, as it did here on the drone plane, it is going to crash for sure. It is not going to come down with a proper landing. Even with [76] the old Jennies in the First World War engines went out very often, but the pilots were able to bring the planes down, they still had control and could direct the course of travel of those planes. The mere fact that aviation itself may not rightly be described as an ultra hazardous activity is no criterion by which we can say the particular action involved in this case was not an ultra hazardous activity.

The San Diego Gas & Electric case was cited for the proposition that the doctrine of *res ipsa loquitur* is applicable in California and that it may be applied under a general application of negligence.

The Court: Yes. I have that case here. Of course,

the decision of the Court of Appeals reversing the case was also based upon the violation of one of the aeronautical rules.

Mr. Rosensweig: Yes.

The Court: There is a principle there that is entirely absent here: The principle of imputed negligence. In other words, wherever there is a rule or law concerning the management of one's property, particularly some instrumentality that is activated by propulsion, whether it be an aircraft or a surface vehicle, or any moving object that is employed for the purpose of transportation of either persons or property, wherever there is such an instrumentality and the governing authority rules for the employment of that [77] instrumentality, the violation of the rule is negligence per se, and unless it is removed in the specific case by evidence contrariwise, the findings of the Court must be in favor of the party alleging negligence. I don't believe that principle is applicable here at all, for two reasons: The first is that the evidence fails to show that there was any rule, aeronautical rule, or act of Congress with respect to the military, that specified the manner in which this exercise (so-called by the officers) was to be done; and the second: That the question of weighing the evidence in a case, even though the doctrine of *res ipsa loquitur* does apply, and I think it does—I agree with you, Mr. Carman; I disagree with the Government on that phase of the case—that the doctrine of *res ipsa loquitur* is applicable in this case; but all that the doctrine of *res ipsa loquitur* does is, that, until it is answered by contrary evi-

dence, it justified the inference that where an injury is caused by an instrumentality that is shown to be exclusively within the dominion and control of a person (and there is no answer as to how the accident occurred), that then the Court may find an inference that the accident occurred by reason of the negligent conduct of the tortfeasor, the Government, in this case. I say that the doctrine, in my judgment, does apply in this case.

But that doesn't terminate this case, in my [78] judgment. For that reason the ruling was made as it was made at the conclusion of plaintiff's case-in-chief, the ruling was made with the reservation that it was made without prejudice to the determination of the case on its merits, at the conclusion of all the evidence. Now all the evidence is in.

In order to appraise this case we must take the climate of the case, the environment under which it arose, the instrumentalities that were employed by those who are concerned in the case, and any other rule of law concerning the appraisal of evidence that is ordinarily applicable in a tort case. Since the Government, by an act of Congress, permitted itself to be sued the provision of the Federal Tort Claims Act, Section 1346 of Title 28 of the United States Code, so far as applicable reads as follows Subdivision (b):

“Subject to the provisions of Chapter 171 of this Title, the District Courts, together with the District Court for the Territory of Alaska, the United States District Court for the District

of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission [79] of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

Now, that means that the local rule with respect to the principles underlying tort cases is to be applied although the case is in the domain of Federal jurisdiction. The local law of California, I think, has been heretofore stated by the Court; and I think, so far as the doctrine of *res ipsa loquitur* is concerned has been accurately stated by Mr. Carman. But the application of that doctrine to the concrete case is the question before the Court.

Now, what is the evidence? Epitomizing it, it is that these men of the Navy were engaged in what they called an “exercise,” which was a practice, or a mission, directed to the attainment of efficiency in the management of aircraft, not aircraft that was to be used at the time in the transportation of persons, but aircraft that was designed for and intended to be used in combat, in the destruction of property. I do not see much analogy there between the responsibility of commercial aviation, because,

as Mr. Rosensweig has pointed out, the rule there is that the same degree of care is to be exercised as is required to be exercised by the carrier of [80] persons on the surface: The highest degree of care. Well, of course men in military service are not required to use the highest degree of care; many times that would defeat the very purpose of the military. I think, perhaps, that is one of the reasons why younger men are those who would be classified in military activities. The matters of caution and circumspection and the highest degree of care are not compatible with the performance of military duty, especially when there is potential combat, or when the exercise is being directed toward the attainment of military excellence in the air.

What was there that these naval personnel could have done in the performance, or, to use the language of the Statute, “* * * within the scope of their offices or employment * * *” that they didn’t do? They were operating in a sphere, that we know from the history of the times, and from the history of this Court’s files, above terrain that has been condemned by the United States as part of the war effort. These Chocolate Mountains, we have had a lot of condemnation suits here that involved the acquisition of that land. Of course these rights-of-way have been excluded, that is true, the rights-of-way of these various enterprises that function there have been excluded from the taking. But that is a very narrow strip as compared with the extent of the terrain that is used for training purposes. [81]

Now the evidence is uncontradicted that at the

time the drone (and I will call it "target" for simplification) was struck, the aircraft involved the flying at about 8000 feet above the surface of the ground; 5280 feet—there is a mile and a half, almost, and it isn't reasonable to suppose the personnel were looking around on the ground; they were looking at the target. They were directing and, of course, exercising such care as would be prudent under the circumstances to aviators who were engaged in that sort of mission. They weren't required to look down to see what was there. It was in a remote part of the country. We have a right to consider that in determining whether or not there is negligence on the part of the United States. It was out in an isolated region selected because of its remoteness from habitation or population, really desert country, but mountainous, such a place that would afford the best means of enabling the aviator to solve problems that they would meet in other districts, and particularly one in which we are now engaged in the Orient, mountainous, and no habitation around that could be affected by the practice in which they were engaged.

When the missile which struck the target caused it to immediately precipitate itself to the ground, the evidence shows that there was a complete loss of control by the control ships, and the circumbience of the target took a very wide circumference, several miles in width. There was no way [82] of determining with precision as to where that was with respect to the power line that was damaged. There was no call, it seems to me, on the part of an aviator there

to exercise any care or caution that was not commensurate with the mission exercised, the practice in which they were engaging.

I don't find anything here that would justify the Court in saying that they did anything recklessly or carelessly or negligently. The matter in which they were engaged did not call for that nicety of calculation that is required in driving a vehicle on the surface; they were there in the air; there was one of the laws that has not yet been debated about, even by science: That the law of gravitation is immutable. There was nothing to hold an instrumentality in the air; when it is there it is going to drop to the earth and that is actually what occurred here. That is what was intended, of course. The evidence does show ordinarily it was the duty of the aviator to bring the target in, however it could be done, but that was an impossibility because all of their controls had been destroyed by the shot which struck the target.

I don't believe there is any justification here under evidence. The evidence preponderates to remove the question of negligence, I think, from the case.

Now, the argument that has been made that [83] the Statute, Subdivision (b), which I have quoted, contains a wrongful act or omission; what wrongful act or omission does the evidence show? Well, it shows that what they did destroyed this company's property. That is wrongful, yes. But then there is another principle of law which is applicable, and that is that there may be an injury without damage,

an old law school principle: *Damnum absque injuria*, you can injure a man's property and yet there is no compensation for that injury. There may be an inevitable accident in which there is a wrongful act committed, but who is responsible for it? That is the problem that arises in a civil court. I don't believe the evidence here justified the Court going to the extent of saying, even under the application of *res ipsa loquitur*, the evidence is so overwhelming that it supports a judgment for the plaintiff.

The damages will be found as claimed, but not assessed as claimed. I mean to say that if on review the reviewing Court should feel the Court is in error as to its interpretation of the evidence and as to its conclusions of law, there is no necessity of re-trying the case; the liability for the amount sued for will be clear, providing the reviewing Court, if there is to be a review, finds that this Court was wrong in its legal conclusions. For those reasons the finding will be in favor of the defendant, the United States, and against the plaintiff as to liability. [84]

You will prepare them, Mr. Rosensweig, and serve them on Mr. Carman.

Mr. Rosensweig: I shall do so, your Honor.

The Court: I have enjoyed the trial, Mr. Carman. I think you presented it very ably, and I am sorry I couldn't agree with you on the facts. [85]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the

United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of July, A.D. 1951.

/s/ FEROL M. HARVEY,
Official Reporter.

[Endorsed]: Filed July 3, 1951.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 17, inclusive, contain the original Complaint; Answer; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points and Designation of Record which, together with the Reporter's Transcript of proceedings on June 12, 1951, and original plaintiff's Exhibit 1 and defendant's Exhibit A, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$1.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 16th day of August, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 13059. United States Court of Appeals for the Ninth Circuit. California Electric Power Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed August 17, 1951.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Civil Action No. 13059

CALIFORNIA ELECTRIC POWER COMPANY,
a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

California Electric Power Company, Appellant above named, intends to rely on the following points on appeal:

1. The evidence does not support the finding of the Court that the injury to Appellant's property was not the direct and proximate result of the negligence or carelessness of Appellee or its agents, servants or employees.

2. The evidence does not support the finding of the Court that neither Appellee nor its agents, servants or employees trespassed on Appellant's property.

3. The doctrine of liability without fault is ap-

plicable under the Federal Tort Claims Act and the Court erred in not applying the same in this case.

HENRY W. COIL,

H. M. HAMMACK,

DONALD J. CARMAN,

KENNETH M. LEMON,

By /s/ DONALD J. CARMAN,
Attorneys for Appellant.

[Endorsed]: Filed August 17, 1951.

[Title of Court of Appeals and Cause.]

DESIGNATION OF RECORD ON APPEAL

California Electric Power Company, Appellant above named, hereby designates the entire record, as transmitted by the Clerk of the District Court, material to a determination of the appeal.

HENRY W. COIL,

H. M. HAMMACK,

DONALD J. CARMAN,

KENNETH M. LEMON,

By /s/ DONALD J. CARMAN,
Attorneys for Appellant.

[Endorsed]: Filed August 17, 1951.